IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. LAMAR ROCFORD HARRIS, Appellant.	No. 63668-5-I DIVISION ONE UNPUBLISHED OPINION FILED: June 7, 2010

Leach, A.C.J. — Lamar Rocford Harris appeals his conviction on two counts of third degree assault for spitting on two King County Metro bus drivers. Harris contends that the court improperly commented on the evidence by instructing the jury that spitting on another person constitutes an assault as a matter of law. Because defense counsel proposed an instruction nearly identical to the one actually given by the court, Harris has waived review of this issue. Even if we were to consider Harris's challenge, it fails since the instruction correctly states that assault may include spitting on another person that is both intentional and offensive. We affirm.

Background

On October 30, 2008, as Mark Schmidt, a King County Metro bus driver, proceeded along his route through the International District in Seattle, he observed Harris direct racial insults at another passenger. Schmidt told Harris

that he had to leave the bus. Initially, Harris refused, but when Schmidt called for assistance, Harris walked to the front of the bus, raised his fist at Schmidt, spat directly into his face, and said, "Black Power." Harris then exited the bus. Schmidt testified that he was "shocked" by the incident. One camera captured the events leading up to the spitting but not the actual spitting.

Later that night, another King County Metro bus driver, Samantha Starr, was operating her bus in downtown Seattle. Starr had stopped to pick up passengers when she inadvertently closed the doors on Harris. Starr immediately reopened the doors for Harris, who boarded the bus and called Starr a "racist bitch." In response to Starr's apologies, Harris repeatedly said, "Black Power." Starr felt threatened and asked Harris to exit the bus. When Harris refused, Starr called for help. At this point, Harris, who was near the rear doors of the bus, walked up to front, told Starr he would give her something to call the police about, and then spat twice into Starr's face. Starr blocked Harris's first attempt with her hand, but the spittle from Harris's second attempt struck the left pane of her glasses. Harris then exited the bus. When asked if she was offended by Harris's actions, Starr answered affirmatively. Cameras on the bus captured the entire incident.

Harris was charged with two counts of third degree assault. At trial, before jury deliberations, counsel for Harris proposed the following definitional instruction of assault:

> An assault is an intentional touching of or spitting on another

> person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or spitting is offensive if the touching or spitting would offend an ordinary person who is not unduly sensitive.[1]

The court gave instruction 6, which contained nearly identical language to Harris's proposed instruction.[2] Harris was found guilty as charged and sentenced to 19 months' confinement.

Analysis

Harris contends that instruction 6 constitutes an improper comment on the evidence. The State preliminarily responds that the doctrine of invited error precludes review of Harris's challenge to this instruction. We agree.

"When defense counsel proposes an instruction identical to the one actually given by the trial court, the invited error doctrine restrains us from reversing the conviction based on an error in that jury instruction."[3] Our courts have strictly applied this rule.[4] "Such challenges can be reviewed through an ineffective assistance of counsel claim, however."[5]

In this case, Harris proposed an instruction nearly identical to the one given by the court. Because Harris does not bring his challenge to instruction 6

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[1] This proposed instruction was based on a modified version of the pattern instruction for assault. See 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 35.50, at 547 (3d ed. 2008).

[2] The sole difference between the instructions is that instruction 6 states, "An assault is an intentional touching of or spitting upon another."

[3] State v. Carter, 127 Wn. App. 713, 716, 112 P.3d 561 (2005) (citing State v. Studd, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999)).

[4] Studd, 137 Wn.2d at 547 ("There can be no doubt that [the invited error doctrine] is a strict rule, but we have rejected the opportunity to adopt a more flexible approach." (citing State v. Henderson, 114 Wn.2d 867, 872, 792 P.2d 514 (1990))).

[5] Carter, 127 Wn. App. at 716 (citing Studd, 137 Wn.2d at 550-51).

as an ineffective assistance of counsel claim, he has waived review of this issue.

Even if we were to consider Harris's challenge to instruction 6, it fails. Harris contends that the trial court commented on the evidence by instructing the jury that "as a matter of law spitting is an assault." In doing so, Harris asserts that giving instruction 6 "relieved the State of its burden of proof and violated article IV, section 16 of the Washington Constitution."

Article IV, section 16 of the Washington Constitution prohibits a judge from "conveying to the jury his or her personal attitudes toward the merits of the case" or instructing a jury that "matters of fact have been established as a matter of law."[6] "But an instruction that states the law correctly and is pertinent to the issues raised in the case does not constitute a comment on the evidence."[7] A challenged jury instruction is reviewed de novo, within the context of the jury instructions as a whole.[8]

Here, the court properly instructed the jury on the definition of assault for purposes of determining whether Harris committed third degree assault by spitting on Schmidt and Starr. Instruction 6 sets forth the elements of assault pertinent to the issues raised in this case by providing that "[a]n assault is an

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[6] State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). Article IV, section 16 of the Washington Constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

[7] State v. Winings, 126 Wn. App. 75, 90, 107 P.3d 141 (2005) (citing State v. Johnson, 29 Wn. App. 807, 811, 631 P.2d 413 (1981)).

[8] State v. Jackman, 156 Wn.2d 736, 743, 132 P.3d 136 (2006).

intentional touching of or spitting upon another person that is harmful or offensive regardless of whether any physical injury is done to the person." With respect to the element of intent, instruction 7 provides, "A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime." With respect to the element of offensiveness, the latter portion of instruction 6 explains, "A touching or spitting is offensive if the touching or spitting would offend an ordinary person who is not unduly sensitive." Instruction 6 thus states that spitting may be an assault provided that it is both intentional and offensive.

This is a correct statement of the law. In State v. Humphries,[9] this court was asked to decide in an appeal from a conviction for simple assault whether the trial court had erroneously allowed the prosecutor in her closing remarks to characterize spitting as an assault. In analyzing this issue, this court examined a definition of assault similar to the one in this case: "'An assault is an attempt to commit a battery, which is an unlawful touching; a touching may be unlawful because it was neither legally consented to nor otherwise privileged, and was either harmful or offensive.'"[10] From this definition, the court noted that "battery is a consummated assault" and that "[s]pitting may constitute a battery."[11] The court thus concluded that "[u]nder the facts and circumstances of this case, we

[9] 21 Wn. App. 405, 409, 586 P.2d 130 (1978).

[10] Humphries, 21 Wn. App. at 408-09 (quoting State v. Garcia, 20 Wn. App. 401, 403-04, 579 P.2d 1034 (1978)).

[11] Humphries, 21 Wn. App. at 409.

find no error in the prosecutor characterizing 'spitting' as an assault."[12]

Similarly, in State v. Jackson,[13] this court, in its analysis of the sexual contact element of second degree sexual molestation, addressed whether ejaculation on another person constituted a "touching." In holding that it was, the court drew upon "a multitude of cases holding that spitting on another is physical contact constituting either a battery or a criminal assault."[14] In particular, the court quoted language from People v. Peck,[15] in which the Appellate Court of Illinois observed, "'[S]ince the development of early common law, spitting has been recognized as an act sufficient to support a battery.'" The Jackson court concluded, "Thus, for over three centuries, the common law has considered the projection of one's bodily fluid onto another a touching sufficient to support a criminal conviction."[16]

Harris argues that Humphries and Jackson are inapposite because these cases do not hold that "as a matter of law spitting is an assault." While this is true, Harris's attempt to distinguish theses cases fails because his complaint with instruction 6 rests on a mischaracterization of that instruction. Nothing in the language of instruction 6 suggests that the jury should find that spitting is an assault per se for purposes of determining Harris's guilt.[17] Rather, as stated

[12] Humphries, 21 Wn. App. at 409.
[13] 145 Wn. App. 814, 821, 187 P.3d 321 (2008).
[14] Jackson, 145 Wn. App. at 821.
[15] People v. Peck, 260 Ill. App. 3d 812, 814, 633 N.E.2d 222, 198 Ill. Dec. 760 (1994).
[16] Jackson, 145 Wn. App. at 821.
[17] Because Harris mischaracterizes instruction 6, the cases he cites in support of his argument are distinguishable. In each of these cases, the court

above, this instruction correctly stated the law and informed the jury that spitting is an assault when it is both intentional and offensive.[18] Instruction 6 therefore does not amount to a comment on the evidence.

Conclusion

We hold that, since defense counsel proposed an instruction nearly identical to instruction 6, the doctrine of invited error precludes review of Harris's challenge to that instruction. Even if we were to consider this challenge, it fails because instruction 6 properly states that assault may include

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impermissibly commented on the evidence by either conveying to the jury the court's personal attitudes on the merits of the case or instructing the jury that factual issues had been established as a matter of law. See Becker, 132 Wn.2d at 65 (special verdict form identifying a youth program as a school was an impermissible comment on the evidence because it effectively removed a disputed fact from the jury's consideration); Jackman, 156 Wn.2d at 742-44 (inclusion of the victims' birth dates in "to convict" jury instructions was a judicial comment on the evidence because it allowed the jury to infer that the birth dates had been proved by the State); State v. Levy, 156 Wn.2d 709, 718-23, 132 P.3d 1076 (2006) (jury instruction's reference to a tenant's apartment as a "building" was a comment on the evidence since it suggested to the jury that the apartment was a building as a matter of law); State v. Lane, 125 Wn.2d 825, 835-39, 889 P.2d 929 (1995) (judge's remarks about a prosecution witness's early release was a comment on the evidence because it conveyed the judge's opinion on a fact relating to the witness's credibility); State v. Eisner, 95 Wn.2d 458, 460-63, 626 P.2d 10 (1981) (court's questions to a witness elicited a description of acts proving the State's case was a judicial comment on the evidence); State v. Lampshire, 74 Wn.2d 888, 891-93, 447 P.2d 727 (1968) (judge's remarks in sustaining the prosecutor's objection was an impermissible comment because it conveyed his opinion about the defendant's testimony); Risley v. Moberg, 69 Wn.2d 560, 561-65, 419 P.2d 151 (1966) (judge's questioning of the respondent's physician constituted a comment on the evidence since it reflected the judge's opinion regarding the credibility of the respondent).

[18] In his closing argument, the prosecutor emphasized these two elements, noting that spitting on another may be unintentional and inoffensive in the context of stage play.

spitting on another person that is both intentional and offensive.

Affirmed.

Leach, A.C.J.

WE CONCUR:

Grosse, J.

Spearman, J.